IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.250 of 1994

Decided on : November 17, 2006

Jeevan Dass **...Appellant.**

VERSUS

Roshan Lal (through LRs) **...Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : **Mr. K.C. Rana, Senior Advocate, with Mr. Ankush Dass Sood, Advocate.**

For the Respondents : **Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.**

Surjit Singh, Judge (Oral)

This second appeal by the defendant is directed against the judgment and decree of the first Appellate Court, whereby the decree of the trial Court in a suit instituted against the appellant by respondent Roshan Lal, hereinafter called plaintiff, restraining the appellant-defendant from raising any construction on land measuring 1 Kanal 6 Marlas (559 Sq. mtrs.), bearing Khasra Nos.1082/313 and 1081/313, has been affirmed and appellant's appeal dismissed.

2. Relevant facts may be summed up thus. Respondent-plaintiff Roshan Lal is recorded as co-owner, to the extent of 1/10th share, in certain Khata alongwith several persons.

Whether the reporters of the local papers may be allowed to see the Judgment?

In the year 1978, he (plaintiff Roshan Lal) sold, through a registered sale deed, 1/7th share in the suit land, which is a part of the aforesaid Khata, in favour of the appellant-defendant. The co-sharers of the plaintiff filed a suit, challenging the sale on the ground that plaintiff Roshan Lal had only 1/10th share in the Khata and, therefore, he could not have sold 1/7th share of the suit land. That suit was decreed by the trial Court. Appellant, who was a defendant in that suit, went in appeal to the Court of District Judge. In that appeal, co-sharers of plaintiff Roshan Lal made a statement that though Roshan Lal had only 1/10th share in the entire Khata, but the whole of the suit land, which bore Khasra No.313, was in possession of the plaintiff-respondent and the area of this property was less than the area to which he was entitled on account of his 1/10th share in the entire Khata. They also made a statement that since the suit land, i.e. old Khasra No.313, was in possession of Roshan Lal, at the time of the partition, whenever that might take place, they would not lay any claim to the said number and allow the entire area thereof to be allotted to Roshan Lal. As a result of the making of the aforesaid statement, appeal was withdrawn by the appellant-defendant.

3. Thereafter, appellant-defendant started raising construction on a portion of the suit land and laid the plinth. The co-sharers of respondent Roshan Lal, who had filed the earlier suit, again instituted a suit against the appellant-defendant, seeking issuance of permanent prohibitory injunction, restraining him from raising any construction or changing the nature of the suit land in

any other manner till the partition took place. That suit was dismissed with the finding that after having made the statement in the appeal in the earlier lis, the co-sharers of respondent-plaintiff Roshan Lal had ceased to have any locus standi to file the suit. This order of dismissal and the aforesaid finding were affirmed right upto the High Court.

4. After the dismissal of the second appeal by this Court, Roshan Lal filed the suit, out of which this appeal has arisen. He sought permanent prohibitory injunction, restraining the appellant-defendant from raising any construction on the suit land. It was alleged that the appellant-defendant had started raising construction and that he had no right to do so, until the property was partitioned or his consent was obtained.

5. The suit was contested by the appellant-defendant. He claimed that, out of the suit land, he had been sold 80 Sq. mtrs. specific area, which was depicted by a min number, i.e. Khasra No.1081/313, Khatauni No.94. He stated that he had been put in possession of the said portion at the time of the sale made in his favour by the respondent-plaintiff Roshan Lal in the year 1978. The trial Court decreed the suit of the respondent-plaintiff, holding that the property is still joint and the appellant-defendant cannot raise any construction, unless the property is partitioned or the respondent-plaintiff consents to the raising of such construction. Appeal carried by the appellant-defendant to the Court of District Judge stands dismissed.

6. The appellant, aggrieved by the judgments and decrees of the two Courts below, filed the present appeal. The appeal was admitted on the following two substantial questions of law:

1. Whether in the facts and circumstances of the case the courts below were justified in decreeing the suit of Respondent-Plaintiff?

2. Whether in view of the judgement delivered in RSA No.392/88 the courts below were legally correct in decreeing the suit of the plaintiff-Respondent.

7. The appeal was allowed by this Court, vide judgment dated 30.7.1997. Respondent-plaintiff went in appeal to the Hon'ble Supreme Court against the judgment of this Court. The Hon'ble Supreme Court has set aside the aforesaid judgment of this Court, with the observation that the High Court normally would not interfere in a concurrent finding of fact, but still in this case the High Court interfered with the concurrent finding of fact, without formulating appropriate questions of law. The Hon'ble Supreme Court then remanded the case to this Court with the direction to consider the matter afresh.

8. As already noticed, this Court admitted the appeal on the aforesaid two substantial questions of law, but in the judgment dated 30.7.1997 no mention of this fact was made and this led the Hon'ble Supreme Court to observe that no substantial question of law was there.

9. I have heard the learned counsel for the parties and gone through the record.

10. Learned counsel representing the respondent-plaintiff has stated that, as a matter of fact, no substantial question of law is involved and the appeal needs to be dismissed summarily. I do not agree with the submission, because, as would be seen from the discussion in the following paragraphs, the two Courts below have omitted to take notice of very important questions, both of law and facts, which has resulted in miscarriage of justice.

11. Now, coming to the substantial questions of law and the merits, certain facts are undisputed. It is not in dispute that respondent-plaintiff made a sale in respect of 80 Sq. mtrs. area out of the suit land in favour of the appellant-defendant by registered sale deed in the year 1978 and received the full consideration. Though in the sale deed there is no mention of any *Tatima* depicting the 80 Sq. mtrs. area out of the suit land, which was sold, yet after the making of the aforesaid sale, suit land, which initially consisted of one Khasra number, i.e. 313, was broken into two Khasra numbers and the area of one such number after break, i.e. Khasra No.1081/313, was shown to be 80 Sq. mtrs. This area was assigned separate Khatauni number and was recorded in possession of the appellant-defendant. Looking to all these facts, I do not think that there can be any manner of doubt that what was sold to the appellant-defendant was Khasra No.1081/313, the area of which is 80 Sq. mtrs, and which, after having been assigned a separate Khatauni number, was recorded in the exclusive possession of the appellant-defendant in the revenue papers. Reference may be made to the *Jamabandis* for the year 1981-82

Ex. P-3 and for the year 1986-87 Ex. P-5. The two Courts below have ignored this vital aspect of the matter.

12. Learned counsel for the respondent argued that the decree, which was passed in the first round of litigation, i.e. in the suit filed by co-sharers of the respondent, challenging the transfer of 1/7th share in the suit land, while respondent's share was only 1/10th, declared that the sale in excess of 1/10th share was invalid and that in view of this decree the appellant-defendant cannot lay claim over an area in excess of 1/10th share of the suit land and that 1/10th share of the area of the suit land comes to around 55.9 Sq. mtrs. His further contention is that after the passing of the decree in the first round of litigation, no *Tatima* in respect of 55.9 Sq. mtrs. area was prepared.

13. I find it hard to accept the argument for at least three reasons. Firstly, the respondent-plaintiff himself had sold 80 Sq. mtrs. area, out of the suit land, and having received the full consideration therefor, is estopped from saying that the appellant's title, in view of the decree passed in the first round of litigation, has been affected even as against him. Secondly, that decree has been passed against the appellant-defendant not on a challenge having been thrown by the respondent-plaintiff, the vendor, to the sale deed, but by his co-sharers and so he cannot derive any benefit out of this decree. Thirdly, though the appeal filed against that decree had been withdrawn, yet the fact that it was only after the making of the statement by the co-sharers of the respondent-plaintiff that the entire suit land would be allowed to be allotted to the respondent-

plaintiff in the partition which might take place at some later stage between the parties and other co-sharers, cannot be lost sight of. Now, when, as per the co-sharers of the respondent-plaintiff, who were the plaintiffs in the first round of litigation, the entire suit land was agreed to be allotted to the respondent-plaintiff in the partition that might take place in future, the appellant-defendant can legitimately be presumed to have been under the impression that since his title had been challenged by those co-sharers only and not by the present respondent-plaintiff, his area in the suit land, i.e. 80 Sq. mtrs., will remain undiminished and that the whole of it, as sold to him, will remain with him, because by the aforesaid statement the respondent-plaintiff had been impliedly conceded to be owner in possession of the suit land.

14. Learned counsel for the respondent urged that since the property was still joint, even though shown to be in exclusive possession of the appellant-defendant, the latter had no legal right to change its nature, until partition took place or unless his consent was obtained and in support of this contention he placed reliance upon the celebrated judgment of a Division Bench of the Punjab High Court in *Sant Ram Nagina Ram versus Daya Ram Nagina Ram*, *AIR 1961 PUNJAB 528.* The argument has been noticed only to be rejected. As noticed hereinabove, the respondent-plaintiff himself sold a specific portion of the suit property for consideration and, therefore, he is estopped from claiming that the property being joint in the record, the appellant-defendant (the vendee) cannot change its nature.

15. As a result of the above discussed position, both the substantial questions of law, reproduced above, are answered in favour of the appellant-defendant. Consequently, the appeal is accepted. The judgments and decrees of the two Courts below are set aside and the suit of the respondent-plaintiff is dismissed.

November 17, 2006(sd) **(Surjit Singh), J.**